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Department of the Interior
Minerals Management Service
Attention: Rules Processing Team (RPT)
381 Elden Street, MS-4024
Herndon, VA 20170-4817

Alternate Energy-Related Uses on the Outer Continental Shelf-1010-AD30

To Whom It May Concern:

The Association to Preserve Cape Cod submits the following comments on the Minerals Management Service's Advance Notice of Proposed Rulemaking (ANPR) regarding alternate energy development on the U.S. Outer Continental Shelf (OCS).

The Association to Preserve Cape Cod (APCC) is a 501(c)3 environmental organization dedicated to protection of the natural resources and quality of life on the Cape Cod peninsula in Massachusetts. Founded in 1968, APCC is the region's leading environmental advocacy organization, and represents the interests of its more than 5,700 members.

As an organization that strives to protect Cape Cod's land-based habitats as well as its coastal and freshwater resources, APCC recognizes that fossil fuel combustion is causing severe damage to human health and the health of our environment. APCC holds that development of clean, renewable energy must be a national priority. The U.S. must develop an energy policy that provides opportunities for the production of renewable energy from appropriate offshore locations. Creation and implementation of a thoughtful, comprehensive program for the siting, permitting and operation of renewable energy facilities will be a significant step toward reducing this country's over-dependence on fossil fuels.

APCC is therefore gratified that the Minerals Management Service (MMS) is developing a regulatory program specifically for the production of alternate energy on the OCS. APCC appreciates the invitation from the MMS and the Department of the Interior for public comment as part of its development of the OCS regulatory program.

Energy Policy Act of 2005

The Energy Policy Act of 2005 authorizes the Department of the Interior to grant leases, easements or rights-of-way on the OCS for the development and support of alternate energy-related uses, to be administered by the

MMS. MMS will also have the authority to regulate energy-related activities on the OCS. It anticipates that the types of alternate energy projects proposed for the OCS will include wind, wave, current and solar energy technologies.

The Act also directs MMS to consult with federal agencies and state governors in order to develop and implement regulations for siting and developing alternate energy uses on the OCS. And, it directs MMS to coordinate and consult with interested and affected parties, including state governors and local governments that may be affected by an alternate energy project proposed on the OCS.

Ocean Management Policy

As offshore development and other uses within U.S. coastal waters intensifies, it is increasingly apparent that the federal government and coastal states must work together to develop a cohesive plan for management of ocean lands and resources. The Massachusetts legislature is currently considering the Massachusetts Oceans Act, which is intended to govern development activities and foster environmentally sustainable uses of marine resources in Massachusetts waters. If the bill passes, Massachusetts will be the first northeast coastal state to adopt an ocean management plan, but it is highly likely that other states will move forward with their own strategies for regulating offshore activities.

With this in mind, MMS should formulate a policy for OCS access that protects OCS resources and is compatible with the environmental protection and management goals that coastal states establish for the waters they control.

Designated Appropriate Use Zones for Alternate Energy

APCC is convinced that a national policy for offshore renewable energy production must include the establishment of pre-designated zones on the OCS for alternate energy uses.

Working under the directives of the Energy Policy Act of 2005 mentioned above, MMS should initiate a federal and state cooperative program to identify areas where the development of alternate energy production facilities is appropriate, and areas where such facilities are deemed inappropriate. It is important that this effort be established at the outset of MMS's OCS regulatory program. Coordination between states, federal agencies and the scientific community—with opportunity for public comment—should result in the identification of zones within the OCS that are most suited and therefore most desirable for alternate energy development, zones where it is allowable, and zones where it is inappropriate and therefore excluded from potential development.

Establishing designated zones gives states clarity over what is to be expected to occur off their coasts. In addition, designation of alternate energy use zones on the OCS would make the regulatory process easier for project applicants, giving them a clear understanding of where development of alternate energy projects is allowable. It would also help prevent an unnecessarily long and expensive permitting process caused by conflicts over OCS uses and objections from states and other affected parties.

Determining Alternate Energy Use Zones

Designated alternate energy use zones would consist of areas where conditions are best suited for alternate energy production, and where there are no overriding environmental, safety or incompatible use concerns.

Zones designated as being inappropriate for alternate energy production should include areas that are of an environmentally sensitive nature or possess significant environmental or natural resource value. For example, areas within the migratory routes, breeding grounds or primary feeding grounds of birds and marine mammals, known fish spawning grounds, and fragile ecosystems such as coral reefs should be designated as inappropriate zones for alternate energy production. Non-environmental factors should also be considered when designating areas as inappropriate for alternate energy production. Areas in the direct path of shipping lanes, areas that support existing uses where safety is an issue, or where other existing uses are incompatible with alternate energy production should also be designated as inappropriate zones.

Designation of appropriate/inappropriate use zones should be determined through environmental and other studies conducted on behalf of MMS, with consultation from state governments and the scientific community, and with opportunity for public comment. Applicable federal agencies should also be consulted. For instance, the National Oceanographic and Atmospheric Administration's National Marine Fisheries Service is uniquely qualified to supply data on fish and marine mammals, as is the U.S. Fish and Wildlife Service for data on birds. The U.S. Coast Guard, the Department of Transportation Maritime Administration and the Federal Aviation Administration are other agencies that should be consulted in the designation of alternate energy production zones on the OCS.

MMS should also take into consideration any pre-existing uses when determining appropriate zones for alternate energy production, particularly if the existing use is a public use or has a public benefit, and if it is consistent with an MMS assessment of appropriate uses for the OCS. Whenever possible, dual uses should be allowed to exist concurrently when they are compatible or at least not in conflict, and if the area can support multiple uses.

Once identified and designated, the zones that are appropriate for alternate energy use should be incorporated into the OCS digital mapping initiative that is outlined in the Energy Policy Act of 2005. The digital mapping initiative is intended to indicate the locations of federally-permitted activities, obstructions to navigation, submerged cultural resources, undersea cables, offshore aquaculture projects and any area designated for the purpose of safety, national security, environmental protection, or conservation and management of living marine resources.

Access to the OCS

Access to the OCS can be termed both as limited access to conduct project feasibility testing, and full access to develop permitted projects. According to the ANPR, MMS plans to establish a competitive process for issuing access rights to the OCS. Two options being considered by MMS to accomplish this objective are:

- a competitive bidding process; and
- direct negotiation.

If the selection process is done by awarding preliminary access to the highest bidder, APCC foresees that large corporations will consistently win out over smaller competitors, even if the smaller competitor may propose a project with greater public benefit, such as fewer environmental impacts, fewer conflicts with other uses, less visual impacts, or use of a more efficient and cheaper energy production technology. Direct negotiation between MMS and potential developers may rectify the above possibility, but a negotiation process must be developed that is sufficiently transparent to satisfy public scrutiny.

Access for Data Collection

According to the ANPR, MMS is seeking comments on whether permits should be required from applicants for OCS access to allow the collection of preliminary data from vessels, and to what extent the information that is collected should be considered proprietary. APCC believes that a permit should be required if the data collection requires environmental disturbance or erection of any data collection equipment. If the data being collected is to be submitted to MMS by the applicant as part of the regulatory review for OCCS access or for a development permit, the data would be part of the public review process and therefore part of the public record.

Criteria for Access to the OCS

In the ANPR, MMS states that it "will require a defined schedule for action and terms and conditions" under which permission for access to the OCS will be granted. MMS also states that project approval "may be contingent on the receipt of certain data and information."

APCC believes the best OCS access policy for MMS to adopt is one that utilizes phased access rights to the OCS, given with conditions; preliminary, limited access should be given before full access for project development is awarded.

Following a selection process, applicants should be given preliminary access in order to determine the feasibility of a project; but this should not guarantee permanent access to a particular site. This initial access should have specified restrictions on the kind of activity that is allowed to occur, and should be granted for a specified duration.

Environmental Protection Oversight by MMS

Ensuring protection of the environment when permitting and developing alternate energy uses on the OCS must be a paramount objective of MMS. According to the ANPR, MMS intends to develop an environmental management system that addresses all phases of access, planning, development, on-going operations and removal of facilities at the end of a project's life. The project should be subject to the regulatory authority of MMS and adhere to all federal environmental laws and regulations through all phases of the project's life.

MMS review and regulatory oversight of proposed projects should require a detailed assessment of potential environmental impacts, establish environmental monitoring programs for the project, require appropriate mitigation to offset environmental impacts, and provide necessary enforcement to ensure environmental protection standards are met and maintained.

Regulatory Review and Permitting Proposed Projects

Before permission to develop a specific project is given by MMS, comprehensive study and review by MMS of the proposed project must be required. The procedures for consulting and coordinating with federal agencies, states and other interested and affected parties during the regulatory review process for proposed projects should be codified in MMS's regulations in as much detail as practicable. APCC strongly believes the project review process must also be one that guarantees and encourages public scrutiny and input.

The policy for consulting with interested parties regarding proposed projects should be guided by the need to compile all necessary data, rather than adhering to a timetable. It is vital that ample time be allowed for the completion of environmental studies so that project impacts can be accurately assessed. Some studies, such as analyzing potential impacts to avian species from certain kinds of renewable energy facilities, may require several years to complete.

Environmental Review of Proposed Projects

Proposed projects falling under MMS jurisdiction should undergo a rigorous and comprehensive review to study environmental impacts caused by the project. Before a proposed project is permitted, an environmental study of the project should consider all project phases, including research, development, ongoing operation, maintenance, decommissioning and removal.

Approval of a project—and for approval of any level of access to the OCS—must be based on compliance with pre-established environmental protection standards.

Measuring Environmental Impacts

As a first step, MMS should model its environmental review standards on those adopted by European countries that have an established history of reviewing and siting offshore alternate energy projects. MMS standards for assessing environmental impacts should

also follow federal environmental protection laws and regulations. MMS should also consult with relevant federal agencies, such as NOAA, coastal states and the scientific community to help establish proper guidelines for environmental review of proposed projects.

When reviewing proposed projects, MMS should also take into consideration the environmental laws and offshore development management strategies of the state or states affected by the proposed project, particularly if the project is in close proximity to state-controlled waters.

MMS's regulatory review of projects should include environmental studies of potential project impacts on animal species that use the proposed project area, including marine mammals, fish, invertebrates and local, seasonal and migrating avian species. Project impacts on species should be evaluated during different weather conditions, species activity (feeding, resting, spawning and migrating), and at different points in the species' life cycles (adult, juvenile, larvae, where applicable). Some studies, such as those examining species population or migration routes, should be conducted over a sufficient period of time to produce an accurate long-term assessment of the species' activity in the proposed project area.

Environmental review of a project should study impacts to animal species from the following:

- noise and vibration above and below water;
- disturbance to the ocean floor, including sediment resuspension and redistribution;
- height of structures above sea level;
- artificial electric and magnetic fields;
- total project footprint; and
- blade rotation (for wind turbines) and other moving components of equipment.

In addition, MMS should require analysis of project impacts on normal sediment transport and natural wave action.

The analysis of data provided in the environmental study should also take into consideration any possible changes to the size and configuration of a project as the review process evolves.

Responsibility for Conducting Environmental Study

Often in state and other environmental review procedures for proposed development projects, the environmental data collected for project review are compiled and interpreted by consultants hired by the project applicant. This scenario frequently puts the objectivity of the environmental report into question. To ensure that the findings reached

in an environmental study of a proposed project are objective, the study should be conducted by an independent third party selected by MMS. The project applicant should be responsible for reimbursing MMS for the costs of conducting the study.

Measuring Environmental Benefits of Alternate Energy Projects

The environmental study for a proposed alternate energy project should analyze how the project will benefit the environment. This should be supplied through information that demonstrates what percentage of the total amount of carbon dioxide and other harmful pollutants produced by conventional power plants in the region will be offset by the clean energy produced by the project.

In implementing a program for measuring environmental benefits vs. detriments, MMS should consider ecological risk assessment techniques using guidelines developed by the U.S. Environmental Protection Agency. An ecological risk assessment brings together the wide range of issues associated with a complicated project proposal. It provides a comprehensive and integrated process to rank the risks and benefits, and then places them into a framework to aid the decision-making process.

Other Criteria for Project Approval

In addition, even though a project is proposed for a site located in a zone designated for alternate energy use, MMS should still confirm that the specific characteristics of the project in question do not pose potential hazards to shipping, commercial fishing, recreational boating or aviation.

The applicant should also demonstrate that a project, occurring on public lands and utilizing public resources, will provide a public benefit. Initial access rights should be revoked if a proposed project is ultimately denied by MMS.

With regard to development approval of large projects, MMS should reserve the right to require that the development occur in phases.

Engineering Considerations and Safety Issues in Regulatory Review

When reviewing alternate energy project proposals, MMS should require engineering studies to show that the project can operate without safety concerns for humans or the environment, and that it will be able to withstand waves, wind and other adverse conditions that may occur on the OCS.

Once site access and a project have been approved, the permit should be subject to periodic review and renewal. A permit for access to develop a project on the OCS should be subject to suspension or cancellation if the project violates the conditions of the permit. The permit should also contain provisions for dismantling the project once it has reached the end of its life.

Compatibility of Project with Proposed Site

The size of a project in terms of its compatibility with a particular site, and with other uses at the site, must be considered during the review process. MMS should provide a level of flexibility in approving proposed projects; rather than only accepting or denying a project as proposed by the applicant, MMS should have the option of permitting a project based on compromise solutions that may produce greater public benefits. Examples of compromise solutions include reducing the size of a project, reconfiguring a project, or relocating a project to another site that may be more compatible with the particular nature of the proposed project.

For those areas within appropriate use zones that may not have the capacity for large-scale projects but are otherwise uniquely suited for alternate energy uses, MMS should encourage applications for moderate and smaller-scale alternate energy projects in order to take advantage of these locations.

Alternatives Analysis

An alternatives analysis is one method for determining whether a proposed project is the best use for a given site. An alternatives analysis would study alternate configurations for the project as well as different project sizes. It would also study other viable sites within the OCS zones designated for alternate energy use that may be better suited for the characteristics of the particular project. An assessment of project alternatives would help determine if the proposed plan was the best plan for the site, whether the existing proposal can be improved, or if conflicts with existing uses can be reduced or eliminated through project reconfiguration or relocation to another site.

Monitoring and Inspection Programs for Permitted Projects

Monitoring and inspection programs are important components in the operational oversight responsibilities of MMS. Monitoring programs should be implemented to determine the effectiveness of mitigation measures and to ensure compliance with environmental protection standards. Once projects have been approved and are operational, periodic monitoring should be conducted by MMS, or an independent third party. In addition, on-site facility inspections should occur annually, and should be conducted by MMS or an independent qualified agency.

Removal of Facility at Conclusion of Project Life

The project developer should bear financial responsibility for dismantling and removal of an alternate energy production facility, as well as restoration of the OCS, at the end of the project's life. To guarantee that sufficient funds will be available for the facility's removal, MMS should require that funds for this purpose be placed in escrow before the project is developed.

MMS has indicated an interest in finding other uses for a facility as an alternative to its removal. This option should be considered if there is an alternative use for the facility that is not incompatible with the public interest or environmental considerations.

Payments and Revenues for Utilization of the OCS

APCC has long maintained that private developers using a public resource such as the OCS for financial gain must pay a fair amount for access to those public lands. MMS has been given the responsibility to ensure that the U.S. receives fair compensation for permitting alternate energy projects to be developed on the OCS, based on royalties, fees, rentals, bonuses or other forms of payment. A simple method for receiving compensation may be achieved by requiring a rental fee for access to a site on the OCS, and then payment from the project developer based on a percentage of the revenues generated by the project once it is developed and operational.

The Energy Policy Act of 2005 further stipulates that states will receive 27% of the revenues collected from projects located within three nautical miles of state submerged lands. A formula is to be established for payment to states that have a coastline within 15 nautical miles of the geographic center of a project, with the percentage of the payment based on the proximity of the project to the coastline. APCC understands this provision to mean that states are still able to require additional revenue from projects that physically overlap state and federal waters.

Profit Disclosure in Project Review Process

The cost to develop the proposed project, as well as the estimated profits the project will yield during its operational life, should be disclosed by the applicant as part of the review process. This information will help MMS determine a reasonable fee structure for access to the OCS. Such financial information provided during the review process can also help MMS and the general public to evaluate the project's anticipated rate of return, compared to the rate of return for a scaled-back project, if a project's proposed size is at issue.

Economic/Market Driven Project Benefits vs. Societal Benefits

The creation of alternate energy facilities on appropriate OCS lands will likely generate employment opportunities and other economic benefits for the regions in which they are located. And, some societal benefits also have economic benefits. For instance, a reduction in human health problems linked to air pollution helps lower healthcare costs; the agricultural industry benefits from actions that slow or reverse global warming; and reduction in coastal erosion associated with sea level rise reduces property damage and insurance costs. But there are public benefits to society other than those that are purely market driven. Increased reliance on clean renewable energy also enables the U.S. to shoulder its global responsibility as the largest energy consumer. Moving to renewable energy is a great leap forward for the United States, and not only benefits our nation, but also benefits the greater global community.

Conclusion

The development of a regulatory policy for granting leases, easements and rights-of-way on the OCS for the purpose of alternate energy production is an important step in establishing a renewable energy program for the U.S. To establish a successful OCS

access policy, MMS should designate OCS zones that are appropriate for alternate energy production, implement a comprehensive review and compliance process, and assure that environmental resources on the OCS are protected. In working to reach these objectives, MMS should coordinate and consult with other federal agencies, coastal states and the scientific community, and should provide ample opportunity for public comment during MMS review of proposed projects.

APCC thanks the Minerals Management Service and the Department of the Interior for this opportunity to comment.

Sincerely,

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